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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 193

FRYD CONSTRUCTION CORPORATION and TRAVELERS INDEMNITY COMPANY, *Petitioners,*

v.

T/N PLUMBING & HEATING CO., *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statutory Provisions Involved | 2-3 |
| Statement of the Case | 3-8 |
| Reasons for Granting the Writ | 9-11 |
| Conclusion | 12 |
| Appendix: | |
| Opinion of Court of Appeals | 1a-10a |
| Judgment of Court of Appeals | 10a-11a |
| Order of Court of Appeals Denying Petition for Rehearing | 11a-12a |
| Opinion and Judgment of District Court | 12a-15a |
| Opinion of the Armed Services Board of Contract Appeals | 16a-53a |


## CITATIONS


| | |
|---|---|
| *Beacon Construction Co. of Mass.* v. *Prepakt Co.*, 375 F.2d 977 (C.A. 1, 1967) | 10 |
| *Continental Casulty Co.* v. *Schaefer*, 173 F.2d 5 (C.A. 9, 1949) | 11 |
| *Fanderlik-Locke Co.* v. *United States for the Use of M. B. Morgan*, 285 F.2d 939 (C.A. 10, 1960) | 10 |
| *United States* v. *Citizens & Southern Nat. Bank of Atlanta, Ga.*, 367 F.2d 473 (C.A. 4, 1966) | 9 |
| *United States* v. *Henke Const. Co., et al.*, 157 F.2d 13 (C.A. 8, 1946) | 9, 11 |

Page

*United States* v. *Maryland Casualty Company*, 384 F.2d 303 (C.A. 2, 1967) ..... 9

*United States for the Use of B's Company* v. *Cleveland Electric Co. of South Carolina*, 373 F.2d 585 (C.A. 4, 1967) ..... 10

*Warrior Constructors, Inc.* v. *Harders Inc.*, 387 F.2d 727 (C.A. 5, 1967) ..... 10

*Wells Benz, Inc.*, v. *United States*, 333 F.2d 89 (C.A. 9, 1964) ..... 9

United States Code, Title 40, § 270a ..... 3-4

United States Code, Title 40, § 270b ..... 2

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Fryd Construction Corporation and Travelers Indemnity Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 19, 1970.

## OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Southern District of Florida, unreported, appears in the Appendix hereto. The opinion of the Armed Services Board of Contract Appeals, unreported, appears in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 19, 1970. A timely petition for rehearing en banc was denied on April 13, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Where Florida corporations entered into a written subcontract in Florida, for work to be performed on a government project in Florida, is the subcontract to be construed and interpreted in accordance with Florida law, or is the Court of Appeals for the Fifth Circuit permitted to create a Federal rule of construction and interpretation? The Trial Court determined Florida law to be applicable. The Fifth Circuit created and applied a Federal rule of construction.

## STATUTORY PROVISIONS INVOLVED

*United States Code, Title 40:*

§ 207b.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof,

unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Aug. 24, 1935, c. 642, §2, 49 Stat. 794; Aug. 4, 1959, Pub. L. 86-135, §1, 73 Stat. 279.

## STATEMENT OF THE CASE

Petitioner, Fryd Construction Corporation, was the general contractor on a government construction project at Patrick Air Force Base, Florida. The petitioner, Travelers Indemnity Company, was surety to Fryd on the bond required by the Miller Act, 40 U.S.C. § 270a. Respondent, T/N Plumbing & Heating Co., was the plumbing subcontractor, for installation of an underground drainage system. Fryd Construction Corporation and T/N Plumbing & Heating Company are both Florida corporations, both of whom have their principal place of business in Florida. The work required by the Fryd-T/N subcontract was to be performed in Florida. The contract between Fryd and T/N was executed in Florida.

The contract documents were in the usual form of government contracts. The prime contract, including the plans and specifications, contained certain general and special conditions relating to the overall project and also contained certain special conditions relating to the drainage structure which, by its subcontract, respondent undertook to perform.

Among the contract provisions of the general contract between petitioner Fryd and the United States were the standard form provisions relating to changed conditions and disputes. They are as follows:

"4. CHANGED CONDITIONS

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordi-

narily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions."

"6. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged. Provided, however,

that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

Among the subcontract provisions were provisions which actually and specifically incorporated the specific provisions of the prime contract relating to the drainage construction work:

"This contract includes all of specifications, general conditions, and or special conditions."

* * *

". . . the contractor and the owner have entered into a contract for the doing of the work therein described, with the terms of which contract the subcontractor acknowledges himself to be familiar; and whereas, the said general contract, and the plans, specifications and drawings described specifically the scope of the work which is required of and from the subcontractor to whom this subcontract is to be awarded: . . ."

* * *

"The subcontractor hereby agrees to do all the work and furnish all the materials required by the terms of the plans, specifications and drawings, and by the terms of the general contract, of and from the drainage structures subcontractor; and the subcontractor convenants and agrees with the contractor that the subcontractor will cause the said work to be done in such manner as will conform to and will comply with the relevant

> portions of the general or prime contract; and, in general, the parties understand and agree that the subcontractor shall do the subcontractor's portion of the work in such manner that if it were being done by the contractor, it would comply with the relevant portions of the general or prime contract."

In addition, the subcontractor specifically agrees to be bound by Section 77 of the General Contract.

> "The Subcontractor agrees to furnish all labor, equipment and material to complete all work as follows: Sec. #77, drainage structures; Sec. #65 excavation, trenching and backfilling for utilities system as applicable. The work under Sec. #77 will be accomplished in accordance with the unit price schedule as set forth in bidding document for amounts as follows: . . ."

Section 77-05(f), provides that as to problems arising as a result of ". . . lines that are not shown on the drawings or the location of which are not known . . .", the cost of these solutions will be made ". . . under the clause of the general provisions of the Contract entitled Changes".

During the course of performing the work required to install the underground drainage system, respondent allegedly encountered underground conditions not shown or accurately described by the plans. Throughout the course of the job respondent submitted claims for extra compensation to petitioner as the underground obstructions were encountered, and petitioner, following the "disputes" clause of the contract, submitted such claims to the contracting officer.

At the conclusion of the job all of respondent's claims for extra and additional compensation were, at

respondent's request, submitted to the Armed Services Board of Contract Appeals by petitioners. Following extensive hearings before the Armed Services Board of Contract Appeals it rendered its decision awarding additional compensation for the undisclosed underground obstructions, which was accepted by the respondent.

While the claims of respondent were pending before the Armed Services Board of Contract Appeals, respondent instituted this suit against petitioners in the District Court pursuant to the Miller Act. After an extensive pretrial stipulation was filed, petitioners moved for summary judgment, urging that the subcontract incorporated the "disputes" clause of the prime contract by reference; that pursuant to the "disputes" clause petitioner, at respondent's request, had instituted proceedings before the Armed Services Board of Contract Appeals and that the Armed Services Board of Contract Appeals had rendered a final decision on such claims. The District Court found respondent bound by the "disputes" clause of the prime contract and entered summary judgment in favor of petitioners.

The judgment rendered by the District Court in petitioners' favor was reversed by the Court of Appeals on the sole ground that the "general" incorporation by reference provision of the subcontract was insufficient to bind the respondent to the "disputes" clause of the prime contract. Without reference to Florida law, the Court of Appeals held that to bind the subcontractor to the "disputes" clause of the prime contract there must be a provision in the subcontract making the "disputes" clause expressly applicable.

## REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of other courts of appeals on the issue of whether state or federal law is to be applied in construing contracts involved in government construction projects.

In its decision at bar, the Fifth Circuit adopted and applied a Federal rule of construction to hold that the general incorporation by reference paragraph of the subcontract and the specific reference to Section 77 of the General Contract in the subcontract between petitioner and respondent did not incorporate the disputes clause of the prime contract between petitioner and the United States. No question regarding the interpretation of the Miller Act was involved, since the Court of Appeals found that the subcontractor *could* agree to be bound by the disputes provision of the prime contract if it does so by "a provision in the subcontract making the disputes clause expressly applicable."

The Second Circuit, *United States* v. *Maryland Casualty Company*, 384 F.2d 303 (1967); the Fourth Circuit, *United States* v. *Citizens & Southern Nat. Bank of Atlanta, Ga.*, 367 F.2d 473 (1966); the Eighth Circuit, *United States* v. *Henke Const. Co., et al.*, 157 F.2d 13 (1946); and the Ninth Circuit, *Wells Benz, Inc.* v. *United States*, 333 F.2d 89 (C.A. 9, 1964), have each held that state law is to be applied in interpreting contracts in actions under the Miller Act when construction of the Act is not involved.

For example, in *Citizens & Southern Nat. Bank*, supra, the contract was silent on the obligation of the general contractor to coordinate the progress of the lathing and plastering subcontractor with the prog-

ress of the tile subcontractor (367 F.2d at 477). The plaintiff contended that the custom and usage of the trade in North Carolina was incorporated into the contract for the reason that it was a North Carolina contract, to be performed in North Carolina. In sustaining this contention the Fourth Circuit held:

> "We agree that the substantive law of North Carolina must be applied in determining the respective rights of the parties. Even though jurisdiction is conferred by the Miller Act, the construction of that statute is not at issue and all acts relevant to the subcontract in question and its performance occurred in North Carolina." (Citations omitted)

The First Circuit, *Beacon Construction Co. of Mass.* v. *Prepakt Co.*, 375 F.2d 977, 980-981 (1967), the Fourth Circuit, *United States for the Use of B's Company* v. *Cleveland Electric Co. of South Carolina*, 373 F.2d 585 (1967), the Fifth Circuit, *Wurrior Constructors, Inc.* v. *Harders, Inc.*, 387 F.2d 727 (1967), and the Tenth Circuit, *Fanderlik-Locke Co.* v. *United States for the Use of M. B. Morgan*, 285 F.2d 939, 942-943 (1960) have held that a general incorporation by reference provision in the subcontract is insufficient to bind the subcontractor to the disputes clause of the prime contract, each such decision assuming the applicability of federal law without discussion of the point, and without distinguishing the contrary decisions of the other circuits cited above.

Government construction projects take place in every state of the country. They are of great importance to the construction industry, with far ranging economic implications. Contracts for government construction

projects have become fairly standardized and this decision, for practical purposes, affects every subcontract on every government job. See *McDaniel* v. *Ashton-Mardian*, 357 F.2d 511 (C.A. 9, 1966). There is nothing inherent in government construction projects which require deviation from the general rule that the construction of federal statutes is a matter of federal law and that the construction of contracts is a matter of state law. Several of the courts of appeals have, however without discussion of the point, singled out the subcontract provision relating to incorporation of the disputes clause and applied a supposed rule federal law of contract construction in determining the sufficiency of the subcontract's attempted incorporation of the disputes clause of the prime contract into the subcontract.

While we recognize that jurisdiction is not founded on diversity, the Eighth and Ninth Circuits, in *United States* v. *Henke Const. Co.*, supra, and *Continental Casualty Co.* v. *Schaefer*, 173 F.2d 5 (1949), have applied the Erie rationale and applied state law in Miller Act actions in construing the contracts between the parties.

Incorporation of the disputes clause of the prime contract in the subcontract is a matter of voluntary choice by the subcontractor. It is often the only way for the general contractor to protect himself from, as happened at bar, the Government rejecting the subcontractor's claim while the subcontractor pursues a suit against the general contractor under the Miller Act. The courts of appeals have differed on whether state or federal law is to be applied in such cases and, therefore, this Court should review this issue.

## CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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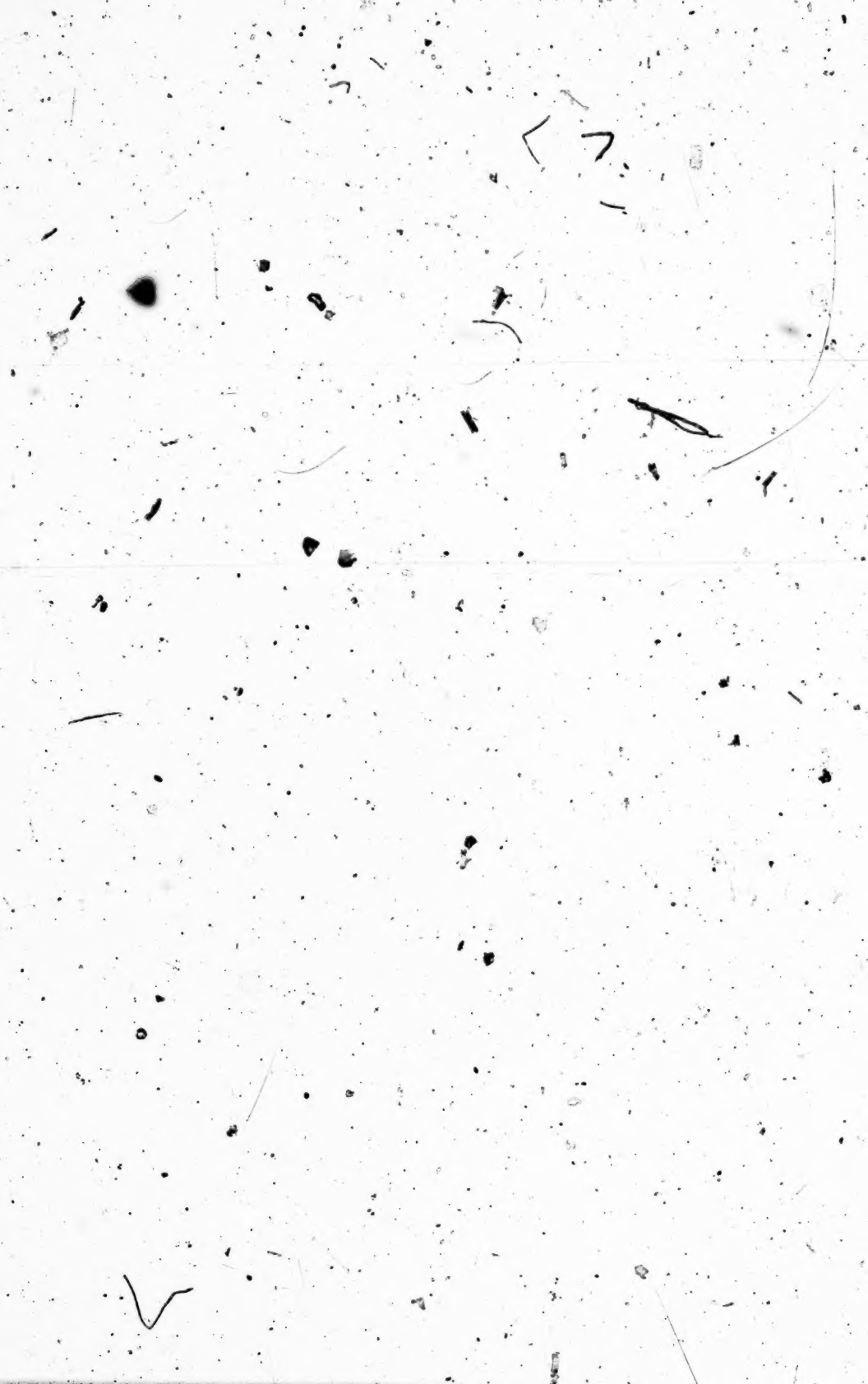
# APPENDIX



# APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27437

UNITED STATES OF AMERICA for the use and benefit of T/N PLUMBING & HEATING CO.,
*Plaintiff-Appellant,*

versus

FRYD CONSTRUCTION CORPORATION, ET AL.,
*Defendant-Appellees,*

AMERICAN FIRE & CASUALTY COMPANY and UNITED STATES OF AMERICA,
*Intervenors-Appellees.*

*Appeal from the United States District Court for the Southern District of Florida*

(February 19, 1970)

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: In this Miller Act (40 U.S.C. §§ 270a-270d) matter, suit was brought by use plaintiff T/N Plumbing & Heating Company, a subcontractor, against Fryd Construction Corporation and its surety, Travelers Indemnity Company, for the sum of $111,216.17, plus interest and attorney's fees, alleged to be due for material and services furnished in connection with the performance of certain drainage work on a Government construction job at Patrick Air Force Base, Florida, in which Fryd was the general contractor with the Government-owner. The contract was executed on November 30, 1962 on Standard Form 23A.

According to the allegations of the complaint, on December 6, 1962, Fryd entered into a subcontract with T/N to perform drainage work in connection with the Patrick Air Force Base job for the price of $66,140.

Use plaintiff T/N further alleged that "As a direct and proximate result of the existence of . . . undisclosed interferences and obstructions" and "at Fryd's special instance and request" it furnished labor and material in prosecution of the work of the fair and reasonable value of $202,879.56 instead of the original agreed figure of $66,140; and that the net sum of $111,216.17 remains due and unpaid. American Fire & Casualty Company, surety on T/N's contract, intervened, claiming right of subrogation and written assignment and indemnification against T/N for sums which it expended on behalf of T/N, pursuant to the obligation under its bond. The United States intervened, asserting a claim for unpaid withholding taxes against T/N.

Fryd and Travelers defend the suit on the ground that the Miller Act is not applicable in this case, that the subcontract was expressly conditioned upon the general contract, that the subcontract required T/N to perform the prime contractor's obligations to the United States, and that the conditions of the general contract control the rights and obligations of T/N. According to the defense, Fryd and Travelers assert as to the disputed additional sum claimed by T/N, that the parties agreed to convert the dispute into one arising under the contract and, therefore, that the claim of T/N is limited to the specific equitable adjustments provided for in the general contract, especially Clause 6 relating to "disputes." The prime contractor contends that the subcontract incorporates, by reference, specific provisions of the general contract and cites the following provisions of the subcontract in support of this contention:

> "14. This contract includes all of specifications, general conditions, and/or special conditions."

Further, from pertinent parts of paragraph 2:

> "The following recitals are hereby declared to be true:
>
> "(a) WHEREAS, the contractor and the owner have entered into a contract for the doing of the work

therein described, with the terms of which contract the subcontractor acknowledges himself to be familiar; and

(b) WHEREAS, the said general contract, and the plans, specifications and drawings described specifically the scope of the work which is required of and from the subcontractor to whom this subcontract is to be awarded; . . . ."

Additionally, the prime contractor points to these provisions of the subcontract:

"3) The subcontractor hereby agrees to do all the work and furnish all the materials required by the terms of the plans, specifications and drawings, and by the terms of the general contract, of and from the drainage structures subcontractor; and the subcontractor covenants and agrees with the contractor that the subcontractor will cause the said work to be done in such manner as will conform to and will comply with the relevant portions of the general or prime contract; and, in general, the parties understand and agree that the subcontractor shall do the subcontractor's portion of the work in such manner that if it were being done by the contractor, it would comply with the relevant portions of the general or prime contract."[1]

Thus the prime contractor argues that there has been incorporated, by reference, into the subcontract the pro-

[1] Additionally, the prime contractor refers to the following provision of the subcontract:

"12. The Subcontractor agrees to furnish all labor, equipment and material to complete all work as follows: Sec. # 77, drainage structures; Sec. # 65 excavation, trenching and backfilling for utilities system as applicable. The work under Sec. # 77 will be accomplished in accordance with the unit price schedule as set forth in bidding document for amounts as follows:"

visions of the general contract, included among which is the following paragraph:

"6. DISPUTES

"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged. Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with Contracting Officer's decision."

From this the prime contractor concludes that the subcontractor has waived its right to sue under the Miller Act and has only those rights set forth in the specific

equitable adjustments herein quoted and as provided for in the general contract.

Fryd argues that the provisions of the subcontract between it and T/N evidence this intention. Fryd refers to the following provisions of the subcontract in support of this contention:

> "8) While the subcontractor is not in default in the performance of the terms of this contract, the contractor will pay the subcontractor the contract price in the following fashion; to wit:
>
> "(a) Progress payments shall be made on the basis of requisitions made by the subcontractor on the as disbursed by Owner days of each month (sic); and each requisition shall include an amount which is the fair cost or value and is also the fair proportion of the total work, included in the period covered by such requisition; and in general, the subcontractor shall never be entitled to include in any requisition any requirement for the payment of money which the contractor himself would not have been entitled to receive, for such work, under the terms of the general or prime contract; . . . ."

Reference is further made by Fryd to the following provision of the subcontract:

> "9) It is further understood and agreed by and between the parties as follows:
>
> . . . .
>
> "(d) . . . it is understood and agreed by and between the parties that the subcontractor shall never be entitled to receive any payment under this contract from the contractor unless and until the contractor has received from the owner a payment which includes, correspondingly, payment for the work which is covered by the requisition of the subcontractor."

We have had occasion recently to consider a similar case under the Miller Act involving the suit of a subcontractor against a prime contractor, namely, *H. W. Caldwell & Son, Inc.* v. *U. S. for John H. Moon & Sons, Inc.*, 5 Cir., 1969, 407 F. 2d 21. In *Caldwell*, the claim of the subcontractor was for the balance owing for regular work performed under the subcontract and extra work resulting from the prime contractor's delay in performing. Caldwell, the prime contractor, contended that Moon, the subcontractor, was bound by the "disputes" clause of the prime contract because in the subcontract, the contractor and subcontractor agreed to be bound by the terms of the prime contract including its general and special provisions. Thus Caldwell argued that Moon had no right to bring a Miller Act suit but was bound by the "disputes" provision of the general contract requiring that the subcontractor pursue its remedies only under that clause. We said in *Caldwell* that the benefits of the Miller Act are primarily intended for subcontractors, 407 F. 2d at 23, and that "the courts do not favor finding that a subcontractor has contractually abandoned his rights under the act." We held that for the principal contract's "disputes" clause to be applicable between the general contractor and a subcontractor, there must be a provision in the subcontract making the "disputes" clause expressly applicable. 407 F. 2d at 23.

As in *Caldwell*, there is no such express provision in the subcontract between T/N and Fryd.[2] We hold, therefore, as we did in *Caldwell*, that a general incorporation by reference, of the terms of the principal contract refers only to "the quality and manner of the subcontractor's work, not the rights and remedies he may have against

---

[2] Curiously enough, in the Fryd-T/N subcontract there is a numbered provision as follows:

> "15. The Subcontractor acknowledges the inclusion of Clause # 21 Standard Form 23A and all clauses set forth in Standard Form 19A as part of his contract, as set forth in Part 1 of the General Conditions of the specifications."

the prime contractor." 407 F. 2d at 23. See also, to the same effect, *Warrior Constructors, Inc.* v. *Harders, Inc.*, 5 Cir., 1967, 387 F. 2d 727; *United States for the Use of B's Company* v. *Cleveland Electric Co. of South Carolina*, 4 Cir., 1967, 373 F. 2d 585; *Fanderlik-Locke Co.* v. *United States for the Use of M. B. Morgan*, 10 Cir., 1960, 285 F. 2d 939, 942-943; *Beacon Construction Co. of Mass.* v. *Pre-pakt Co.*, 1 Cir., 1967, 375 F. 2d 977, 980-981.

The District Judge granted summary judgment in this case against use plaintiff T/N and in favor of Fryd and Travelers, American Fire & Casualty Company and the United States. In granting summary judgment in favor of Fryd and Travelers, the District Court said in part as follows:

> "The subcontract was expressly made subject to the prime contract and to conditions contained in the subcontract. Among the subcontract conditions which bear on the issues are the following. The subcontract provides for a fixed subcontract price in Paragraph 7 thereof, and provides that there shall be no addition thereto or change in the amount thereof unless accomplished by a written instrument signed by both parties. This provision is binding and enforceable and except for the equitable adjustments authorized through the administrative procedures described herein no changes or deviations in the contract price were authorized by an instrument in writing signed by the parties. In addition, the subcontract provides and the subcontractor agreed, that it would never be entitled to receive any payment under the subcontract from the prime contractor unless and until the prime contractor has received from the Government a payment which includes, correspondingly, payment for the work which is covered by the requisition of the subcontractor. This provision is binding and enforceable and except for the sums which the Court heretofore found (in the Summary Judgment filed December 30,

1968, in this cause) that FRYD had lawfully withheld as a result of conflicting claims, all of the funds received from the Government as payment for the work under the subcontract have been paid to use plaintiff."

The reasons given by the District Court for granting summary judgment in favor of Fryd and Travelers are erroneous as a matter of law and are opposed to our holding in *Caldwell*, supra, as well as those of numerous other circuits whose decisions we have previously cited. We disagree, therefore, with the lower court's decision that the only remedy available to use plaintiff is to be found in "the equitable adjustments authorized through the administrative procedures" provided in the general contract between Fryd and the Government-owner. We also disagree with the contention of the prime contractor that the circumstance of appellant's participation and cooperation with Fryd in the presentation of claims to the Armed Services Board of Contract Appeals estops appellant from asserting its claim here. The general contract here is between Fryd and the Government. T/N is, therefore, without standing before the Board and its conduct does not justify a holding of waiver or estoppel. In this regard we said, in our recent decision in *Warrior Constructors, Inc.* v. *Harders, Inc.*, 5 Cir., 1967, 387 F. 2d 727, 729, the following:

> "Since there is no contract, express or implied, between a subcontractor and the government, there is no procedure by which the claim of a subcontractor can be presented against the United States except as it may become a claim of the prime contractor. A subcontractor has no standing before the Contracting Officer or the Board of Contract Appeals, and no provision is made for the hearing of disputes between a prime contractor and a subcontractor. The remedy for a subcontractor seeking to recover for labor and materials furnished on a government contract is under the Miller Act, and it has been held that when a prime

> contractor has a claim for the same amounts pending under the 'disputes clause' of the prime contract, a subcontractor's claim under the Miller Act is not affected."

Since we hold that T/N did not waive its rights under the Miller Act and that the summary judgment in favor of Fryd and Travelers is erroneous as a matter of law, it is necessary that we reverse and remand for a full evidentiary trial on the merits. It is obvious that there are complicated issues of fact to be tried which do not lend themselves favorably to disposition by summary judgment. Obviously, there is a dispute as to the nature and extent of the furnishing by T/N of material and services on the Patrick Air Force Base job; also, as to whether there were obstructions and interferences to T/N's performance, whether Fryd directed T/N to perform additional work and waived the provisions of the contract requiring such additions to be reduced to a written agreement between the parties. (See subcontract, paragraph 7.) There are undoubtedly numerous additional issues of material fact which can only be resolved by taking of evidence at a trial. The disputes between T/N and Fryd cannot properly be resolved, therefore, by motion for summary judgment. See Fed. R. Civ. P., Rule 56.

It is quite a different matter, however, as to granting of summary judgment in favor of intervenors, American Fire & Casualty Company and the United States of America. The amounts paid by T/N's surety company, American, were not disputed, and reasonable and necessary attorney's fees were properly assessed. Nor was the amount of withholding taxes due intervenor, the United States, disputed. T/N's counterclaim against the United States cannot properly be used as an offset to this tax claim because T/N was not privy to the contract between the United States and Fryd, *Warrior Constructors, Inc.* v. *Harders, Inc.*, 5 Cir., 1967, 387 F. 2d 727, 729. Since T/N could not have brought an original suit against the

United States, it may not defend by setoff or counterclaim the tax claim of the United States. See *United States* v. *Patterson*, 5 Cir., 1953, 206 F. 2d 345. These summary judgments must, therefore, be affirmed.

REVERSED AND REMANDED as to judgment in favor of Fryd and Travelers; AFFIRMED as to judgments in favor of American Fire & Casualty Company and the United States of America.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27437

D. C. Docket No. Civ. 65-153-EC

UNITED STATES OF AMERICA for the use and benefit of T/N PLUMBING & HEATING Co.,
*Plaintiff-Appellant.*

versus

FRYD CONSTRUCTION CORPORATION, ET AL.,
*Defendants-Appellees.*

AMERICAN FIRE & CASUALTY COMPANY and UNITED STATES OF AMERICA,
*Intervenors-Appellees.*

*Appeal from the United States District Court for the Southern District of Florida*

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

**Judgment**

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be, and the same is hereby, reversed and remanded to the said District Court as to judgment in favor of Fryd and Travelers; and that this cause be, and the same is hereby affirmed as to judgments in favor of American Fire & Casualty Company and the United States of America in accordance with the opinion of this Court.

It is further ordered that plaintiff-appellant be condemned to pay one-half of the costs in this Court, and defendants-appellees be condemned to pay one-half of said costs.

February 19, 1970

Issued as Mandate:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27437

UNITED STATES OF AMERICA for the use and benefit of T/N PLUMBING & HEATING CO.,
*Plaintiff-Appellant,*

versus

FRYD CONSTRUCTION CORPORATION, ET AL.,
*Defendants-Appellees,*

AMERICAN FIRE & CASUALTY COMPANY and UNITED STATES OF AMERICA,
*Intervenors-Appellees.*

*Appeal from the United States District Court for the Southern District of Florida*

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(April 13, 1970)

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

PER CURIAM: The petitions of plaintiff-appellant and defendants-appellees for rehearing are DENIED and no

member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on reharing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the suggestion of defendants-appellees for rehearing en banc is DENIED.

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IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTERICT OF FLORIDA, MIAMI DIVISION

No. 65-153-CIV-EC

UNITED STATES OF AMERICA for the use and benefit of T/N PLUMBING & HEATING CO., *Plaintiff*,

v.

FRYD CONSTRUCTION CORPORATION, a Florida corporation, and TRAVELERS INDEMNITY COMPANY, a foreign insurance company doing business in Florida, *Defendants*,

AMERICAN FIRE & CASUALTY COMPANY, a Florida corporation, and UNITED STATES OF AMERICA, *Intervenors*.

**Summary Final Judgment in Favor of Defendants Fryd Construction Corporation and Travelers Indemnity Company**

THIS CAUSE came on to be heard upon the Motion for Summary Final Judgment filed by the defendants, the prime contractor FRYD CONSTRUCTION CORPORATION (FRYD), and its surety, TRAVELERS INDEMNITY COMPANY (TRAVELERS), and the Court having examined the pleadings, having considered the submissions in support of and in opposition to the motion, including the extensive pretrial stipulation, and being otherwise fully advised in the premises, finds that there is no genuine issue as to any material fact and that FRYD and TRAVELERS are entitled to a summary final judgment in their favor as a matter of law dismissing this action.

Use plaintiff contends that in the course of performing the underground drainage subcontract work it encountered

obstructions not reflected on the plans and specifications prepared by the UNITED STATES, and that as a result it was unable to perform the work within the time it had anticipated and was put to considerable additional expense. Neither FRYD nor TRAVELERS had any part in the preparation of the plans and specifications.

The prime contract contained the standard government contract provisions granting the Government the right to make changes in the work within the general scope of the contract as necessitated by changed conditions. Subsurface or latent physical conditions at the site differing materially from those indicated, and unknown physical conditions at the site of an unusual nature differing materially from those ordinarily encountered are changed conditions.

The subcontract was expressly made subject to the prime contract and to conditions contained in the subcontract. Among the subcontract conditions which bear on the issues are the following. The subcontract provides for a fixed subcontract price in Paragraph 7 thereof, and provides that there shall be no addition thereto or change in the amount thereof unless accomplished by a written instrument signed by both parties. This provision is binding and enforceable and except for the equitable adjustments authorized through the administrative procedures described herein no changes or deviations in the contract price were authorized by an instrument in writing signed by the parties. In addition, the subcontract provides and the subcontractor agreed, that it would never be entitled to receive any payment under the subcontract from the prime contractor unless and until the prime contractor has received from the Government a payment which includes, correspondingly, payment for the work which is covered by the requisition of the subcontractor. This provision is binding and enforceable, and except for the sums which the Court heretofore found (in the Summary Judgment filed December 30, 1968, in this cause) that FRYD had lawfully withheld as a result of conflicting claims, all of the

funds received from the Government as payment for the work under the subcontract have been paid to use plaintiff.

The general procedure specified in the prime contract to be followed with respect to adjustments to the contract price is described in detail in *McDaniel* v. *Ashton-Mardian Company*, 9th Cir., 357 F. 2d 511 (1966), and need not be restated here.

The method of computing adjustments to the contract price provided for in the contract documents is valid and enforceable and was followed. Numerous hearings were held before the contracting officer in connection with these equitable adjustments, and the use plaintiff, being dissatisfied with certain of them, caused the prime contractor to seek review before the Armed Services Board of Contract Appeals. This Court stayed the Miller Act proceedings pending determination of the administrative procedures. Compare *United States for the use and benefit of Capolino* v. *Electronic & Millite Facilities*, 2nd Cir., 364 F. 2d 705 (1966).

Under the contract documents the use plaintiff agreed to perform the subcontract work for the subcontract price, subject to adjustment in accordance with the procedures set forth in the contract documents. The sums computed in accordance with the contract documents and paid by the Government to the prime contractor in accordance with the contract documents for the use plaintiff's portion of the work are not in dispute.

By a prior summary judgment in this cause, filed December 30, 1968, the Court found that FRYD lawfully withheld certain sums from use plaintiff for the reason that conflicting claims to the sums were made by a number of claimants, including the UNITED STATES for unpaid taxes of use plaintiff, and including use plaintiff's surety, AMERICAN FIRE & CASUALTY COMPANY (AMERICAN), by virtue of an assignment. In that summary judgment, the Court directed FRYD to pay from the funds in its possession

the sum of $13,439.03 to AMERICAN for moneys which had been advanced by AMERICAN to pay the claims of laborers and materialmen contracting with use plaintiff on this project. It appears that the admitted portion of the claim of the UNITED STATES for unpaid withholding taxes greatly exceeds the sum of $9,875.25 remaining in the hands of FRYD and use plaintiff can not be entitled to any portion thereof. It is, therefore,

ORDERED AND ADJUDGED as follows:

1. The motion of FRYD CONSTRUCTION CORPORATION and TRAVELERS INDEMNITY COMPANY for summary final judgment be and the same is hereby granted, and this cause be and the same is hereby dismissed as to those defendants with prejudice to and at the cost of use plaintiff, T/N PLUMBING & HEATING COMPANY.

2. FRYD CONSTRUCTION CORPORATION be and it is hereby ordered and directed to pay to the UNITED STATES, within ten (10) days from the date of this Order, the sum of $9,875.25, being the balance of the subcontract price remaining in its possession. Upon the failure of FRYD to pay said sum, the Court will, upon the certificate of the UNITED STATES, enter a judgment in the sum of $9,875.25 in favor of the UNITED STATES against FRYD CONSTRUCTION CORPORATION and TRAVELERS INDEMNITY COMPANY.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 8th day of January, 1969.

/s/ EMETT C. CHOATE
*Senior Judge*
*United States District Court*

ARMED SERVICES BOARD OF CONTRACT APPEALS
WASHINGTON, D. C.

ASBCA No. 10247

Appeal of—

FRYD CONSTRUCTION CORPORATION
Under Contract No. DA-08-123-ENG-4710

APPEARANCES FOR THE GOVERNMENT:

Colonel Lawrence P. Hansen, JAGC
Chief Trial Attorney

Edwin Kircher, Jr., Esq. and
Gordon A. Satterwhite, Esq.,
Trial Attorneys

APPEARANCES FOR THE APPELLANT:

Eugene C. Heiman, Esq.,
Myers, Heiman & Kaplan

Hugh S. Glickstein,
T/N Plumbing & Heating Co.

**Opinion by Mr. Thompson**

These proceedings represent the consolidation by agreement for purposes of hearing and decision of three appeals, taken at different times, seeking price increases on account of interferences encountered in the installation of an exterior storm sewer system which was included in a contract for the construction of two administrative buildings at Patrick Air Force Base, Florida, for a lump sum price of $1,761,180.30. The relief sought is a price increase to compensate for delay.

*Contract Provisions (Rule 4 Ex. 7; Supp. Rule 4 Ex. 9)*

The invitation to bid and the contract contained the usual general provisions regarding changes, changed conditions, and suspension of work, the latter reading as follows:

"PRICE ADJUSTMENT FOR SUSPENSION, DELAY, OR INTERRUPTION OF THE WORK (NOV. 1961)

"(a) The Contracting Officer may order the Contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

"(b) If, without the fault or negligence of the Contractor, the performance of all or any part of the work is for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of the contract, or by his failure to act within the time specified in the contract (or if no time is specified, within a reasonable time), an adjustment shall be made by the Contracting Officer for any increase in the cost of performance of the contract (excluding profit) necessarily caused by the unreasonable period of such suspension, delay, or interruption, and the contract shall be modified in writing accordingly. No adjustment shall be made to the extent that, performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted. No claim under this clause shall be allowed (i) for any costs incurred more than twenty days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply where a suspension order has been issued), and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay,

or interruption but not later than the date of final payment under the contract. Any dispute concerning a question of fact arising under this clause shall be subject to the Disputes clause."

Also, pertinent incorporated general and special conditions provided:

"PART I—GENERAL CONDITIONS
(Construction Contract)

* * *

"GC-5. PROGRESS CHARTS, AND REQUIREMENTS FOR OVERTIME WORK:

a. The contractor shall within 5 days or within such time as determined by the contracting officer, after date of commencement of work, prepare and submit to the contracting officer for approval a practicable schedule, showing the order in which the contractor proposes to carry on the work, the date on which he will start the several salient features (including procurement of materials, plant and equipment) and the contemplated dates for completing the same. The schedule shall be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion at any time.

* * *

"GC-9. PROTECTION OF EXISTING STRUCTURES, UTILITIES, WORK . . .:

"a. Any damage to existing structures or work of any kind, or the interruption of a utility service resulting from failure to comply with the requirements of this contract shall be repaired or restored promptly by or at the expense of the contractor.

* * *

"PART II

SPECIAL CONDITIONS

* * *

"SC-15 PROTECTION OF EXISTING UTILITIES: Except as otherwise provided in the section ELECTRICAL WORK; EXTERIOR, in addition to the requirements of paragraph 'Protection of Existing Structures, Utilities, Work and Vegetation' in PART I—GENERAL CONDITIONS, the following provisions shall apply: When existing utility lines or structures are indicated on the drawings, and when existing utility lines that are to be removed occur within the area of operations, the Contractor shall notify the Contracting Officer in ample time for taking measures for prevention of interruption of any required service, prior to beginning of operations. The existing utilities that are shown on the drawings or the location of which is made known to the Contractor prior to beginning of operations, or which is located, or would be located by the Contractor by the exercise of reasonable diligence in accomplishing the work required by paragraph 'Staking' in the section ELECTRICAL WORK; EXTERIOR, and all utility lines constructed during the Contractor's operations shall be protected from damage, and if damaged thereby, shall be repaired by the Contractor at no additional cost to the Government. In the event that the Contractor damages any existing utility lines that are not shown on the drawings or the locations of which are not known to the Contractor, report thereof shall be made immediately to the Contracting Officer. If the Contracting Officer determines that repairs shall be made by the Contractor, such repairs will be ordered under the clause of the General Provisions of the contract entitled 'Changes'."

*Description of New Storm Sewer Line as Planned (Supp. Rule 4 Ex. 21, 22, 23, 24)*

The two new buildings were to be constructed in an existing administrative area a short distance west of state highway A1A and near the main gate. The new storm sewer system was not planned specifically to serve the new buildings but to take care of drainage from existing base streets and surface areas a substantial distance from the site of the new buildings as well as the streets adjacent to the new buildings. The existing streets bordered areas substantially occupied by existing structures or devoted to other uses which were and remained in operation and contributed substantial traffic to the streets.

The new storm sewer system was laid out to connect at its lowest elevation at existing drainage structure A with an existing 54 inch outfall system which drained west into the Banana River. The new system was shown as bordering and, at various points, crossing the lines of various base streets, and as including new drainage structures, numbered substantially in ascending order, at turns, at branch feeder connections, at points of change in the diameter of pipe to be used, and at points where inlets or access to the line were desired. The specified diameter of the new pipe as it began at existing structure A was 48 inches. At specified places the pipe diameters were to be progressively decreased as the elevation of the line rose to points where the system would receive the storm water, over a range from the diameter of 48 inches down to 12 inches. The principal parts of the new system were a main line, called line B, and a branch called line C which was to feed into line B near the new buildings.

The total pipe length shown for line B was approximately 2237 feet and for line C was approximately 852 feet, making a grand total pipe length of approximately 3089 feet. The new drainage structures to be installed along line B were shown in the following sequence from existing drainage

structure A by the following designations: 1, 2, 3, 4, 5, 6, 6A, 7, 8, 7A, 8A, 9, 10, 11, 13, 12, 14, 15, 17, 16, 19, 18, 20 and finally, 21, the terminal structure on line B. The new drainage structures to be installed along line C were shown in the following sequence from the junction with line B at new structure 9 by the following designations: 1C, 2C, 3C, 4C, 7C, 5C and 6(C), the terminal structure on line C.

*Surface Obstructions Shown With or Without Solutions*

Storm drainage plan and profile contract drawings (Supp. Rule 4 Ex. 22, 23, 24) showed surface obstructions in the form of street and driveway surfaces and the appurtenant curbs to be crossed and necessarily disturbed or removed in the course of installing the new storm sewer system; a utility pole and down guy interference near new structure 2 on line B for which no solution was indicated; and a light pole to be removed and reset at new structure 19 on line B.

*Subsurface Obstructions Shown To Be Removed*

The drawings also showed various interfering or nearby subsurface, or partly subsurface, structures to be totally removed, as follows: a storm sewer line paralleling line B between existing structure A and new structure 2, a distance of approximately 72 feet; catch basins and manholes to be removed near new structures 1 and 2 on line B; a crossing steam line a few feet northeast of new structure 5, between that structure and new structure 6, on line B; a catch basin to be removed near new structure 6 on line B; a crossing duct to be removed between new structures 1C and 2C on line C; a catch basin and manhole to be removed at new structure 3C on line C; a drain and inlet to be removed between new structures 3C and 4C on line C; a catch basin and manhole to be removed at new structure 11 on line B; catch basins to be removed near new structures 12 and 13 on line B; a storm sewer to be removed paralleling line B between new structures 12 and 13, a distance of 60 feet; a manhole to be removed between new structures 13

and 14 on line B; a parallel storm sewer to be removed for most of the distance of 425 feet between new structures 11 and 15 on line B; a catch basin to be removed at new structure 18 on line B; catch basins and manholes to be removed between new structures 20 and 21 on line B; and a parallel storm sewer to be removed between new structures 20 and 21, a distance of 50 feet, on line B.

*Other Subsurface Obstructions Shown With or Without Solutions*

The same contract drawings also showed some interfering or possibly interfering subsurface obstacles which were not to be totally removed but which, variously, were to be raised for clearance, or relocated, or protected, or for which no solution was indicated, as follows: a crossing water line to be raised for clearance between new structures 2 and 3 on line B; a converging and crossing street lighting circuit between new structures 3 and 4 on line B; a duct crossing the new line a short distance west of new structure 5 on line B; a water line intersecting the location of new structure 5 on line B; a street lighting circuit parallel to line B to be temporarily moved and replaced for a distance of about 250 feet between new structures 6 and 7; a duct crossing line B at new structure 8A; a drain crossing line C between new structures 1C and 2C; a duct intersecting the location of new structure 10 on line B; a parallel cable conduit to be protected a distance of 60 feet between new structures 12 and 13 on line B; a crossing water line to be raised for clearance between new structures 13 and 14 on line B; a crossing duct to be relocated for clearance between new structures 14 and 15 on line B; a crossing water line to be raised for clearance between new structures 15 and 17 on line B; a crossing street lighting circuit between new structures 15 and 17 on line B; and a parallel street lighting circuit to be temporarily moved and then replaced for a distance of 208 feet between new structures 17 and 19 on line B.

*General Description of Additional Interferences Not Shown, and Mislocated Interferences*

Appellant encountered numerous additional existing subsurface utilities of various kinds not shown on the contract drawings. Some of the additional utilities turned out to be in active use and had to be kept that way; some turned out to be inactive and could be torn up. In either case, the location of the additional hidden utilities was totally unknown to both the Government and appellant. The Government, of course, knew that its various buildings, installations, and base streets were being serviced by active utilities. The Government, however, apparently could not account for their presence except at the points where the service might be initiated and at the points where the service might be delivered for use or disposal. Once a utility was located the Government was able to determine rather quickly whether the utility was active or inactive but was not always able to provide a solution for the interference immediately. The Government's explanation for the absence of information as to the location of utilities is that the existing base was crash-constructed in war time.

The unknown obstructions, whether active or inactive, caused stoppages in varying degrees of magnitude for investigation, instructions, and corrective action where necessary. Also, some elevations and locations of obstructions shown were found to be in error, causing similar interruptions of the work. Both parties interpreted the contract as giving the Government a reasonable time to arrange, on notice from appellant, for street interruptions at the points where the new system would cross streets.

*Relationship of Storm Sewer Work to Other Work—Schedule for Storm Sewer Work*

As depicted on the contract drawings, and under the schedule drawn up by appellant and submitted under GC-5a after the commencement of work, the new storm sewer

was independent of all other work and would not become critical in terms of the contract completion time unless the storm sewer work were delayed into a period beyond completion of all other work. Appellant's schedule disclosed contemplated completion of the storm sewer system within 88 calendar days after commencement of work, i.e. by 19 April 1963. Appellant began staking out the line for the storm sewer system at some time prior to 21 January 1963 and planned to begin installation on that date. For reasons to be stated later, appellant's work on 21 January was limited to further preparation. Appellant substantially completed the storm sewer system on 21 December 1963 (leaving only minor punch list items and clean up work not asserted by appellant to be involved in the present claims). That was within the required time for completion of the contract but was 256 calendar days beyond the time for completion of the storm sewer system which appellant's storm sewer schedule had contemplated. The delay beyond 19 April 1963 in the storm sewer work did not affect any other work. Appellant did not cause any interruption of utility service by breaking through activity utility lines, except in one instance involving a vitreous clay drainage line.

*First Appeal—Contracting Officer's Decision, Dated 22 July 1964 (Rules 4 Ex. 1-6)*

The first appeal taken was a timely appeal dated 21 August 1964 from a decision of the contracting officer dated 22 July 1964 refusing to increase the amount provided in *Modification 24* (Change "W"), which stated that it was issued pursuant to the "changes" clause of the contract, for ordered changes in the storm sewer system made necessary by interferences due to existing sub-surface utility lines not shown on the contract drawings in the vicinity of new drainage structure 5. The interferences consisted of an active steam line, an inactive water line, and an active duct bank running across the line of the new storm sewer system near new structure 5 as the line proceeded from new structure 4. Appellant had refused to

agree to Modification 24, dated 4 March 1964, which had then been issued on 6 May 1964 as a unilateral modification making a net increase of $4,771 in the contract price. The amount which appellant had claimed as a price increase in a letter to the contracting officer dated 26 June 1963 was $7,637.09 and covered the period 9-25 April 1963. The total of $7,637.09 incorporated $6,240.95, including additives, for extra work in overcoming the interferences and $1,346.82, including additives, for stand-by time of labor and equipment while awaiting instructions 9-11 April and 16 April, plus an over-all additive of $49.32 for appellant's bond expense. The additives included in the sub-item of $1,346.82 for idle time covered taxes and insurance, subcontractor overhead and bond, and appellant's overhead. Neither Modification 24 nor the contracting officer's decision of 22 July 1964 itemized the components of the $4,771 price increase unilaterally allowed by Modification 24. However, the contracting officer's decision asserted that the contract did not provide for adjustments for the increased cost of performing the unchanged work but only for the cost of performing the changes. The appeal taken 21 August 1964 was duly docketed by the Board. Consolidation with the other two appeals from later decisions of the contracting officer took place at the hearing.

*Second Appeal—Contracting Officer's Decision Dated 1 December 1964 (Supp. Rule 4 Ex. 15)*

The second appeal (not separately docketed), was taken 16 December 1964 from a decision of the contracting officer dated 1 December 1964 which issued *Modification 30* as a unilateral modification after appellant had refused to assent to it. Modification 30 stated that it was issued pursuant to the "suspension of work" and "changed conditions" clauses and increased the contract price by $8,906.04. Modification 30 and the accompanying decision of the contracting officer, without any breakdown of the amount, indicated that the increase in price was to cover: (a) the ordered suspension of work not covered by Modification 7 (see third appeal, below); (b) corrective work required

for interferences which were either unknown and not shown, or were shown but incorrectly located, on the contract drawings, and were discovered in the period 23 January to 31 August 1963 (Change "G"); and (c) corrective work for an interference on 30 September and 1 October 1963 (Change "AP"). The contracting officer's decision dated 1 December 1964 stated that the above amount did not cover additional costs of performing unchanged work due to the interferences referred to in (b) and (c), above.

As to the period from 23 January to 31 August Modification 30 was not all inclusive. Modification 24, already mentioned above, and Modification 11, described later below, related to events occurring within that period.

*Third Appeal—Contracting Officer's Decision Dated 4 May 1965 (Rule 4 Ex. 8; Supp. Rule 4 Ex. 10, 11, 17)*

The third appeal (also not separately docketed) was taken 7 May 1967 from a decision of the contracting officer dated 4 May 1965. This decision of the contracting officer purported to be responsive to letters dated 2 February, 5 March, 12 April and 22 April 1965 from appellant to the contracting officer. The letter dated 2 February enclosed a statement indicating the days on which obstructions had been encountered from 23 January 1963 through 22 November 1963, not excluding the period covered by Modification 24 and the first appeal, and a statement of subcontractor's costs through January 1964. The letter dated 5 March stated that appellant's claim covered interferences throughout the entire system. The letter dated 12 April 1965 stated a claim as follows:

| | |
|---|---|
| Subcontractor total additional costs for performing the changed work, overhead, profit and bond | $100,387.95 |
| Prime contract overhead and profit, 12% | 12,046.55 |
| Subtotal | 112,434.50 |
| Prime contractor bond .065% | 730.82 |
| Total additional costs | $113,165.32 |

Appellant's letter dated 22 April 1965 stated that the above was in error as to subcontractor costs and that the following should be added:

| | |
|---|---|
| Superintendent plus the cost of original tools and equipment consumed on this job | $ 7,500.00 |
| Subcontractor overhead, 10%, and profit, 10% | 1,575.00 |
| Subtotal | 9,075.00 |
| Subcontractor bond, 1% | 90.75 |
| Subtotal | 9,165.75 |
| Prime contractor overhead and profit, 12% | 1,099.89 |
| Subtotal | 10,265.64 |
| Prime contractor bond, .065% | 66.73 |
| Total | $10,332.37 |

Appellant stated that its total claim with the foregoing added was $123,497.69. This amount, therefore, was intended to reflect all claims on all three appeals and to supersede any amounts previously claimed.

The contracting officer's decision dated 4 May 1965 (third appeal) referred to various contract modifications. The circumstances respecting those modifications were as follows:

(1) Appellant had assented in writing to *Modification 7* (Change "D"), dated 8 February 1963 (Supp. Rule 4 Ex. 12), which stated that it was issued pursuant to the "changes" clause and increased the contract price by $2,360.47 for rerouting the new storm sewer and adding new manhole 2A between new drainage structures 2 and 3. That work had been performed following the issuance of an express stop order 26 January 1963 and a suspense period lasting to 5 February 1963.

It is undisputed that Modification 7 covered only the execution of the change itself and not any delay expense, which the parties put aside for future action (see *Second Appeal*, above, from Modification 30).

(2) Appellant had assented in writing to *Modification 11* (*Change "Z"*), dated 28 September 1963 (Supp. Rule 4 Ex. 13), which stated that it was issued pursuant to the "changes" clause and increased the contract price by $137.77 for a revision to new drainage structure 10.

(3) Unilateral *Modification 24* (*Change "W"*), dated 4 March 1964 and a contracting officer's decision thereon dated 22 July 1964, had been issued under the circumstances previously described (see *First Appeal*, above), adding $4,771 to the contract price for work at and in the vicinity of new structure 5.

(4) Appellant had assented in writing to *Modification 26* (*Change "AB"*), dated 13 November 1963 (Supp. Rule 4 Ex. 14), which stated that it was issued pursuant to the "changes" clause and increased the contract price by $5,096.54 for adding new interference manhole 14A between new structures 14 and 15.

(5) Unilateral *Modification 30*, dated 5 November 1964, had been issued under the circumstances indicated above (*Second Appeal*) and had increased the contract price by $8,906.04.

(6) Unilateral *Modification 32*, (*Change "AM"*), dated 9 July 1964 (Sup. Rule 4 Ex. 16), had been issued under cover of a contracting office's decision dated 10 August 1964 after appellant had refused to assent to it. Modification 32 stated that it was issued pursuant to the "changed conditions" clause and increased the contract price by $7,609. Modification 32 and the accompanying decision of the contracting officer indicated that the increase in price was to cover

interferences which were either unknown and not shown, or were shown but incorrectly located, on the contract drawings, and were discovered in the period 1 September 1963 through 18 December 1963. The contracting officer's decision dated 10 August 1964 stated that the above amount did not cover additional costs of performing unchanged work. Appellant did not appeal within 30 days after receipt of that decision.

The contracting officer's decision dated 4 May stated the following conclusion:

> "Your claim, as presented, is based on an alleged increase in cost of performing unchanged work as a result of the above mentioned changes, and as such, is a claim for consequential damages. I do not find, nor have you cited, any provision of the contract which would allow me to consider such claims. Further, I consider those modifications which have been accepted by you as a full accord and satisfaction as to the matters contained therein, and not subject to renegotiation."

The Government contends that the third appeal is untimely as to the subject matter of unilateral Modification 32.

*Scope of Consolidated Claim Before the Board*

Appellant contends that the third appeal, from the contracting officer's decision dated 4 May 1965, brought to the Board a claim including all prior claims for additional costs of the specific delays attributable to specific undisclosed and unknown utility interferences, disclosed utility interferences incorrectly shown, and disclosed utility interferences shown correctly but without a solution, throughout the length of the new storm sewer system, plus costs associated with a slow down or reduction in efficiency after passing the location of new structure 5 which was induced

by experience before reaching that location. We think appellant's contention as to the content of the claim before the Board is true in part.

Appellant's contention is true as regards the subject matter of the modifications assented to by appellant, to wit, Modifications 7, 11, and 26. The record is consistent with the parties not having considered costs of the character above described in executing those modifications. From the record it appears that the contracting officer at all times declined to include any such costs where asked to do so. It follows that the claim for such costs survived those modifications and was not denied prior to the contracting officer's decision of 4 May 1965 from which a timely appeal was taken. Accordingly, we reject the defense of the Government that the agreed to modifications bar all claims.

Appellant's contention is also true as to the subject matter of unilateral Modifications 24 and 30. As to the subject matter of those modifications, appellant preserved any rights it had by timely appeals.

Appellant's contention does not fully apply as to Modification 32. As to Modification 32 the contracting officer's decision dated 10 August 1964 purported to deny any claim based on the subject matter of the modification, being described as interferences, etc., discovered in the period 1 September through 18 December 1963, and appellant did not appeal within the required time. Accordingly, to the extent of interferences encountered in that period the consolidated appeal must be dismissed pro tanto as untimely, subject, however, to the qualification that two days within that period are not excluded. The period described in Modification 32 conflicts on its face, to the extent that it includes the dates of 30 September and 1 October 1963, with the time period specified in later Modification 30, since Modification 30 specified those dates in addition to a time period beginning 23 January and running through 31

August 1963. The supporting record shows that the 30 September - 1 October item was not in fact considered in connection with Modification 32. Consequently, the claim period for specific delays includes those two dates. The matter barred by Modification 32, moreover does not extend to the alleged reduction in overall efficiency based on earlier events.

The consolidated claim before the Board does not include any claim that the dollar amounts allowed by the contracting officer for execution of the solutions per se should be increased. Appellant offered no evidence to that effect. The parties stipulated at the hearing that the dollar amount of the delay claim will be subject to remand by the Board to the extent that entitlement is found to exist.

*Government's Obligations Under the Contract With Respect to Interferences*

The Government has acknowledged, under the terms of this contract: (1) a duty to provide engineering solutions for interferences consisting of unknown and undisclosed subsurface utilities, whether active or inactive; (2) a similar duty to provide engineering solutions for interferences consisting of utilities which had been disclosed but which had been incorrectly shown or shown correctly but without any engineering solution; (3) a duty to provide a price increase for the execution of solutions; (4) a duty to provide a price increase, in Modification 30, for the express suspension of work on 26 January 1963, in an amount which has not been isolated from other elements of the price increase provided by Modification 30.

The Government, at the same time, has denied all liability for delay, whether reasonable or unreasonable, in providing the solutions it admittedly was bound to furnish, except in the single instance of the express suspension. It is clear, however, that, to the extent such delay may have been of unreasonable length, a question to be decided here, the Government is bound, by paragraph (b) of the suspen-

sion of work clause to compensate the contractor for increased costs of performance so caused, by providing an increase in the contract price, subject only to the limiting conditions stated in paragraph (b). See *Larco Painting Company*, ASBCA No. 6005, 60-1 BCA ¶ 2655. The extent to which the Government may have failed to discharge that obligation with respect to specific work stoppages associated with specific interferences is the initial question of liability to be determined, and will be considered prior to consideration of the question of liability for an alleged slowdown of actual progress between obstacles after the location of new structure 5 had been reached, due to events occurring before appellant reached the location of new structure 5.

*Interferences and Related Specific Stoppages in Claim Period, 21 January - 31 August 1963 and 30 September - 1 October 1963*

The various interferences or groups of interferences and related work stoppages are described below by items numbered in ascending order to correspond with the sequence and direction of construction beginning with existing structure A.

*Item 1—Base of Existing Structure A*
*(Supp. Rule 4 Ex. 22)*

Although appellant has listed this item it was not in fact an obstruction to forward progress from existing structure A but an existing defect in the base of structure A. Any delay fell within the period of delay involved in Item 3, below. The corrective work for the defect in structure A was covered by Modification 30.

*Item 2—Active 12 Inch Water Line Not Shown*
*(Supp. Rule 4 Ex. 22)*

An active 12 inch water line not shown crossed the path of line B between existing structure A and the location of new structure 1. Any delay fell within the period of delay

involved in Item 3, below. Corrective work for the 12 inch water line was covered by Modification 30.

*Item 3—Pole and Down Guy (Supp. Rule 4 Ex. 12, 22; App. Ex. B)*

The pole and down guy near new structure 2 and between that structure and new structure 3, on line B, was a surface obstruction shown on the pertinent drawing (Supp. Rule 4 Ex. 22) but for which no solution was indicated. Although the Government's duty to provide a solution thus antedated 21 January 1963, the contracting officer took no action of any kind until 26 January 1963, a Saturday and a day on which work would have been prevented by rain in any case, when he issued an express order to stop work pending development of a solution for the interference.

After working hours on Friday, 1 February 1963 the contracting officer terminated the stop work order and provided the solution in the form of a rerouting of the new line to avoid the pole and down guy, involving installation of an additional manhole at a turn in the rerouted segment between new structures 2 and 3. Appellant was unable to work on Monday, 4 February, on account of rain. Appellant resumed work Tuesday, 5 February 1963.

The corrective work, exclusive of suspension costs, for Item 3 was covered by agreed Modification 7, and the express suspension period was covered by unilateral Modification 30.

*Delay Involved in Items 1, 2 and 3*

On the evidence (Supp. Rule 4 Ex. 12; Tr. 14, 15, 17, 77, 78, 182, 208, 246-249) any lack of progress in the period 21 January through Friday, 25 January 1963 was not due to the absence of solutions for Items 1 and 2. On the first day, 21, January, because of rain, appellant could not have done anything more than the preparatory work which it did perform, and during the remainder of the period appellant was waiting for some solution for Item 3.

Item 1 was not of a nature to obstruct forward excavation but appellant had not excavated the 20 feet between structure A and new structure 1 by the time it resumed work on 5 February after termination of the stop order. Appellant did not encounter Item 2, which lay within the 20 foot distance, until 5 February and, according to uncontradicted evidence for the Government, did not report Item 2, together with Item 1, until 6 February, and received a solution on 7 February for both Items 1 and 2. In the period 21 January through 4 February appellant accomplished no more than additional preparatory work.

Although evidence for the Government indicates that appellant did not call the Government's attention to Item 3 until 26 January, we find that appellant was reasonable in not proceeding from structure A at an earlier date. The Government had an antecedent duty to provide a solution for the known interference involved in Item 3 independently of any prodding from appellant. Moreover, Item 3 was close enough to new structures 1 and 2 to raise a question as to whether or not the portion of the line on the near side of both new structures 1 and 2 might be involved in any solution for Item 3. That finding disposes of any inferences from evidence for the Government, in conflict with that for appellant, that appellant did not have well points at structure A on 21 January, or thereafter until 7 February, for the necessary dewatering of structure A.

We find that the delay for the four day period 22 January through 25 January is chargeable to Item 3. In view of the failure of the Government to perform its antecedent obligation, we find that all of the four days constituted unreasonable delay. See *E. B. Bush Construction Co., Inc.*, ASBCA No. 8573, 1963 BCA ¶ 3657. We find that the further delay on 6 and 7 February was reasonable.

Accordingly, of the work stoppage of 13 work days falling between 20 January 1963 and 8 February 1963, 2 days were due to rain, 4 days constituted unreasonable delay chargeable to Items 1, 2 and 3, 2 days constituted reason-

able delay in connection with those items, and 5 days constituted the express suspension period recognized by the Government.

*Item 4—Commercial Cable*

Appellant has listed this item as "Unable to locate commercial cable" at a point between new structures 2 and 3 on line B. Since we have not been shown any indication of this on the pertinent drawing and there is no other evidence whatever to indicate what was involved, or any delay, we find no unreasonable delay in connection with Item 4.

*Item 5—Abandoned Manhole Not Shown (Supp. Rule 4 Ex. 15, 22; Tr. 19, 20, 250-252)*

Although appellant listed this item as occurring between new structures 2 and 3, the only evidence concerning it is that it was encountered by appellant's excavating machine on 22 March 1963 between new structures 3 and 4 on line B; that the solution was provided on the spot; and that appellant removed the manhole the same day with the use of an air hammer after exposing it by hand digging. We find that the work stoppage in terms of forward progress amounted to one day and was a reasonable delay. The additional costs incurred on Item 5 were costs of correction covered by unilateral Modification 30.

*Item 6—Abandoned Six Inch Fuel Line Not Shown (Supp. Rule 4 Ex. 15, 22; App. Ex. B; Tr. 20, 253, 254)*

Item 6 was encountered beyond Item 5 between new structures 3 and 4 on line B on 25 March 1963. The Government provided a solution, which was to remove the line, and appellant completed the removal, all within 6 hours after discovery of Item 6. We find that the work stoppage in terms of forward progress amounted to one day and constituted reasonable delay. The additional costs of correction incurred on Item 6 were covered by unilateral Modification 30.

*Item 7—Active Two Inch Water Line (Supp. Rule 4 Ex. 15, 22; App. Ex. B; Tr. 20, 21, 81, 82, 254)*

Item 7 was found to be lying along the path of line B instead of lying across it as shown, at a point between Item 6 and new structure 4. On appellant's evidence, Item 7 was encountered on Thursday, 28 March 1963. The solution, to remove the water line and install a new non-interfering water line, was provided by the Government on Tuesday, 1 April 1963. Appellant's evidence, however, shows a work stoppage of only 1 day, which we find reasonable. The corrective work was covered by unilaterial Modification 30.

*Item 8—Steam Line, Water Line and Duct Not Shown Near New Structure 5 (Rule 4 Ex. 3; Supp. Rule 4 Ex. 22; App. Ex. B; Tr. 21-24, 84-86, 88, 89, 91, 92, 258-261)*

On Tuesday, 9 April 1963, appellant encountered an active steam line not shown between new structures 4 and 5 on line B, at a point 30 feet west of the location of new structure 5, and stopped excavation but continued to probe ahead, discovering a water line 15 feet west of new structure 5 and a duct 10 feet west of new structure 5, both of which were not shown. The duct was discovered 10 April. On 11 April the Government instructed appellant to solve the steam line interference by notching a casing to provide clearance. Appellant worked on that solution on Thursday and Friday, 11 and 12 April and completed it on Monday, 15 April. On 15 or 16 April appellant was instructed to solve the duct interference by extending new structure 5 west to include it. Appellant did not discover the water line until 16 April, although it was located between the steam line and the duct, and was advised on 17 April that the water line was dead and could be torn up.

On 11 April a solution for the duct interference had become critical in terms of forward progress, apart from any work done to correct the steam line interference. We find

that of the 7 work days in the period 9-17 April work was stopped on approximately 6 days, of which 4 days constituted reasonable delay and 2 days constituted unreasonable delay. According to appellant's evidence no forward progress occurred in the period 17-25 April when 6 work days were available. Appellant elected to work on new structure 5 as changed in that period. It has not been shown that progress beyond new structure 5 could not have been achieved concurrently with the work on new structure 5. The corrective work was covered by unilateral Modification 30.

*Summary of Unreasonable Delay, 22 January - 17 April 1963*

Up to 17 April 1963 appellant suffered a total of 6 days of unreasonable delay caused by the Government.

*Item 9—Active Vitreous Clay Drainage Line Not Shown (Supp. Rule 4 Ex. 15, 22; App. Ex. B; Tr. 24, 25, 95, 96)*

On 8 May 1963 appellant's excavating machine tore up an active 4 inch vitreous clay drainage line not shown in the vicinity of new drainage structure 6 on line B. Corrective instructions were supplied by the Government on 9 May in the form of a direction to install about 30 feet of new pipe in substitution for the broken drain. We find that a work stoppage of one day occurred and was a reasonable delay. The corrective work was covered by unilateral Modification 30.

*Item 10—Inactive Eight Inch Cast Iron Line (Supp. Rule 4 Ex. 15, 22; App. Ex. B; Tr. 25, 26, 100, 101, 272-274)*

On 18 July 1963 at 10:30 AM appellant encountered an 8 inch cast iron line in lieu of the 8 inch vitreous clay line shown near new structure 8 on line B. The Government advised immediately that the line was inactive and could be removed, which was accomplished by 1:30 PM. The

work stoppage of 3 hours involved no unreasonable delay. The corrective work was covered by unilateral Modification 30.

*Item 11—Active Two Inch Water Line Not Shown (Supp. Rule 4 Ex. 15, 22; App. Ex. B; Tr. 26, 27, 101-103, 279)*

On 25 July 1963 appellant encountered an active 2 inch water line not shown crossing the path of line B between new structures 8 and 8A. The solution provided and accomplished the same day was to slide the new pipe under the water line. We find that the work stoppage amounted to ½ day and involved no unreasonable delay. Corrective work was covered by unilateral Modification 30.

*Item 12—Active Three Inch Water Line Not Shown and Two Active Steam Lines Shown at Wrong Elevations (Supp. Rule 4 Ex. 15, 23; App. Ex. B; Tr. 27, 28, 109-111, 280, 281)*

On Wednesday, 31 July 1963, appellant encountered a 3 inch water line not shown crossing the path of line B between new structure 8A and 9. Also, just beyond the water line it was found that two active existing steam lines shown as crossing line B were at elevations differing from the elevations shown. The solution for the water line, provided the same day, was to slide the new pipe under the water line. The solution for the steam lines was a direction by the Government on 1 August to install a new interference manhole. We find that the work stoppage amounted to one day and involved no unreasonable delay on the part of the Government. The corrective work was covered by unilateral Modification 30.

*Item 13—Active Two Inch Water Line Not Shown (Supp. Rule 4 Ex. 15, 23; App. Ex. B; Tr. 28, 29, 111, 112, 281)*

On Friday, 2 August 1963 appellant encountered an active 2 inch water line not shown crossing the path of line B between the steam lines involved in Item 12 and new

structure 9. The solution provided and accomplished the same day was to slide the new pipe under the water line. We find that the work stoppage amounted to approximately ½ day. There was no unreasonable delay on the part of the Government. The corrective work was covered by unilateral Modification 30.

*Item 14—Oversize Concrete Duct At New Structure 10 (Supp. Rule 4 Ex. 23, 24; Tr. 112, 281-283, 285, 286).*

On reaching new structure 9, which was to be the junction with line C, appellant elected to proceed with line C, and reached the location of new structure 10, which was 110 feet from new structure 9, on 8 August. There appellant uncovered an intersecting concrete encased structure where the contract drawings simply showed a ten inch intersecting steam line. The intersecting structure was larger than could be handled with a normal interference structure. Appellant considered that it had encountered a compensable condition and raised the question. Further details are postponed to Item 15, below, since appellant elected, pending Government action on this question and another matter involving a proposed new electrical duct, to go back to new structure 9 and proceed along the path of line B to the location of new structure 10.

*New Structure 10* on line B was 30 feet from new structure 9. At the location of new structure 10, on Monday, 19 August 1963, it was discovered that the dimensions specified for the new interference manhole to be installed were insufficient to accommodate an electrical duct shown as passing through new structure 10, since the duct was of greater width than had been supposed. The solution, to increase the size of new structure 10, was provided by the Government on 20 August. The corrective work was covered by agreed Modification 11. We find that the work stoppage amounted to one day and that there was no unreasonable delay on the part of the Government.

Appellant then proceeded to new structure 11, 15 feet from new structure 10, at the corner of Second and C Streets and the point at which line B would cross C Street. Here, on 21 August 1963, a difficulty was encountered in getting permission to obstruct C Street, and appellant elected to go back to new structure 1C on line C.

*Item 15—Steam Line and Proposed Electrical Duct at New Structure 1C (Supp. Rule 4 Ex. 15, 23, 24, 26; Tr. 29, 30, 112, 116-118, 281-283, 285)*

The evidence shows that the existing intersecting encasement which had been encountered 8 August on line C enclosed steam supply and condensate return piping, and that the Government had already effected a change in the portion of the contract relating to the heat distribution system so as to call for the removal of the existing piping and its replacement with "new 10" casing, 3" diameter steam supply, and 6" casing, 1½" diameter condensate return piping," which had not yet been installed. The change in the heat distribution system was taken care of by agreed Modification 12 (Change "Q").

On 8 August appellant had also been concerned with a prospective interference due to a proposal change in the portion of the contract which would call for a new electrical duct to cross the path of line C in the vicinity of new structure 1C at an elevation not yet determined.

The new steam line at new structure 1C would produce a larger size interference than that originally shown, and since this change in contract requirements had already been ordered, the Government should have had a solution at hand on 8 August. On 15 August appellant was told simply to remove the existing steam line at new structure 1C, which did not solve the fresh interference problem presented by the new steam line. There is evidence that ultimate solutions for the new steam line and new electrical duct interferences were available by 21 August, but there

is no evidence that they were available at a time sufficiently in advance of 21 August to have made it reasonable for appellant to rescind its move back to new structure 9 so as to resume work at new structure 1C on line C earlier than 21 August, which, we infer from the evidence, was the date on which appellant finally moved back to structure 1C after it encountered difficulty in getting permission to take line B across C Street at new structure 11. Ten normal work days could have been anticipated in the period 8-21 August. One day became unavailable because of rain and another because of reasonable delay on account of Item 14. We find that appellant experienced a work stoppage amounting to approximately one half of the 8 days which were left, and that the 4 days constituted unreasonable delay in the provisions of final solutions for the conditions affecting new structure 1C. The corrective work was covered by unilateral Modification 30.

*Item 16—Active Vitreous Clay Drainage Line (Supp. Rule 4 Ex. 15, 24; Tr. 31, 32, 118, 119, 286)*

En route north from new structure 1C to new structure 2C on line C appellant encountered an active vitreous clay drainage line on 26 August 1963 which was at a lower elevation than shown. The solution, to tap the v. c. line and connect it with line C, was provided on the same day. We find that the work stoppage amounted to approximately ½ day and that there was no unreasonable delay by the Government in furnishing a solution. The corrective work was covered by unilateral Modification 30.

*Item 17—Duct Near Structure 2C (Supp. Rule 4 Ex. 24; Tr. 119, 287)*

On 27 August 1963 appellant exposed a concrete electrical duct as shown at a point about 40 feet south of new structure 2C. The duct was noted to be not in use and to be removed. Because of a question as to whether the duct might, in spite of the note, contain active communication

cables, the duct was investigated, with negative conclusions after an investigation lasting approximately one hour, and appellant was then advised that appellant might proceed to remove the duct.

The work stoppage was approximately one hour and there was no unreasonable delay on the part of the Government in this instance.

*Item 18—Outage of C Street; Communication Cables and Ducts Not Shown Near New Structure 13 (Supp. Rule 4 Ex. 15, 23; Tr. 31-34, 120-124, 287, 288)*

On Wednesday, 28 August 1963, when appellant was working at new structure 2C on line C, appellant was granted permission to block C Street in order to carry line B across C Street from new structure 11 to the location of new structure 13, a distance of 50 feet. Appellant had already, on 27 August, begun probing the path of the line between new structure 11 and the location of new structure 13, and elected to come back from new structure 2C in order to proceed across C Street on line B from new structure 11. Proceeding from new structure 2C to new structure 3C would also have involved crossing C Street.

On Thursday and Friday, 29 and 30 August, appellant encountered a number of communication cables and electrical ducts which were not shown crossing the path of line B between new structures 11 and 13 and which the Government determined were active. Line B could pass under the interfering ducts and cables without any change in specified elevation. The directed solution was to proceed by hand excavation to new structures 13 while protecting the cables and ducts.

The solution for the ducts and cables was directed on Tuesday, 3 September. 31 August and 1 and 2 September were non-work days. We find that the work stoppage amounted to one day and was a reasonable delay. The corrective work was covered by unilateral Modification 30.

At the same time, it is evident that the Government had taken too long, i.e. 21 to 28 August 1963, to arrange for appellant to block C Street. C Street was heavily traveled, passing through hospital and administrative areas which remained in use, but the Government knew from the outset that C Street would have to be blocked at some time to permit both lines B and C to cross C Street, knew well before 21 August that the time was nigh, and should have had a plan ready before 21 August to put into effect on that date. Forward progress was achieved along line C in the period 21-28 August, in which 6 work days were available. We find that the work stoppage amounted to 2 work days and that this constituted unreasonable delay consumed in moving back and forth between lines B and C as an incident of the unavailability of C Street.

*Item 19—Active Vitreous Clay Sanitary Sewer Near New Structure 7C (Supp. Rule 4 Ex. 15, 24; Tr. 36, 132, 289)*

An intersecting sanitary sewer shown as not interfering about 10 feet north of new structure 7C was discovered by appellant on 30 September 1963 (after appellant's return at an earlier date to line C) to be at an elevation lower than the elevation shown, so as to conflict with line C. The Government on the same day provided the solution, which was to notch the top of line C and enclose the two lines in a protective brick and concrete structure. We find that the work stoppage amounted to ½ day and was a reasonable delay on the part of the Government in providing a solution. The corrective work was covered by unilateral Modification 30. No additional interferences were encountered on 1 October 1963. Item 19, therefore, is the last item in the claim period for delays involving immediate work stoppages due to specific interferences.

*Summary of Conclusions as to Extent of Work Stoppages Constituting Unreasonable Delay Due to Failures of the Government to Act Within a Reasonable Time in the Claim Period 21 January - 31 August 1963 and 30 September - 1 October 1963*

Appellant suffered immediate work stoppages of unreasonable length totaling 12 days due to delay (beyond that already recognized by the Government in connection with the express suspension) in receipt of solutions from the Government for interferences in this period. It is undisputed that the delays were without any fault or negligence on the part of appellant and were not concurrent with delays due to other causes; that the causes of the delay were recognized by Government instructions providing solutions and that appellant stood by awaiting such instructions; and that the conditions of paragraph (b)(ii) respecting the time of incurrence of additional costs and for assertion of a claim have been satisfied or waived. Accordingly, appellant is entitled to an equitable adjustment in the contract price for the increased costs incurred during the 12 days of work stoppages which would not have been incurred in the absence of the stoppages. Appellant will have the opportunity of establishing the types of costs involved and the amounts thereof. The adjustment will not, however, include any allowance for profit in view of the exclusion of profit by paragraph b(ii).

*Other Delays (App. Ex. B; Tr. 231, 269)*

*Equipment Change.* Appellant's equipment rental arrangements expired at the end of April with the result that appellant had no equipment, while making arrangements to get some, on 30 April and 1, 2 and 3 May, a period which appellant describes as "equipment change," and as without any forward progress. Work would have been prevented by rain on 3 May in any case. As of 30 April ascertainable work stoppages had already accrued to the extent of 34 work days consisting of 8 days of rain, 6 days

of unreasonable delay and 9 days of reasonable delay in connection with interferences, an ordered work suspension of 5 days, and 6 days due to appellant's election to work on new structure 5 as changed without concurrent forward progress on line B beyond the location of new structure 5. In addition, forward progress had been delayed in an undetermined amount by a failure of appellant to shore excavations and by a change in superintendents.

According to appellant, it obtained the use of equipment rented at higher cost and used it in the period beginning 6 May and ending 13 May.

We find that the work stoppage on 30 April and 1 and 2 May 1963 is not chargeable to the Government as unreasonable delay under paragraph (b)(ii) for the reason that prior delays for which the Government was not responsible would have been the cause of an extension of the work beyond 2 May 1963 even if no prior delay chargeable to the Government had taken place. As a consequence, any increased cost of rented equipment in the period 6-13 May 1963 is also not recoverable. The increased cost, if any, would have been incurred even if no prior delay chargeable to the Government had taken place.

*Loss of Equipment.* Appellant's evidence shows that appellant had no equipment for pipe installation between 13 May and 28 June 1963 and made no forward progress whatever in that period, for which 34 normal work days could have been foreseen, and in which 25 work days would have been in fact available if there had been any equipment. At the end of the period appellant purchased a crane and rented a back hoe. We have not been shown any evidence explaining the failure to obtain equipment until 28 June. Appellant has made no contention nor is there any evidence that the Government was responsible for the failure. As previously stated, appellant's original equipment arrangements would have expired during delay for which the Government was not responsible even if no prior delay for which it was responsible had occurred.

*Overall Slowdown or Reduction in Efficiency*
*(App. Ex. D; Tr. 91, 94, 95, 231-236)*

As previously stated, the appeal presents the further contention that, apart from specific work stoppages connected with specific utilities not shown, appellant's realization, as it approached the location of new structure 5, of the threat of future encounters with sub-surface utilities not shown, compelled appellant to change its method of planned operation so as to proceed more slowly than appellant had contemplated.

Appellant planned to and did use a mobile excavating machine called a "Gradall," which was equipped with a back hoe type excavator on the end of a long adjustable boom and was designed for rapid trench excavation. According to appellant, the Gradall would be closely followed by a crane truck which would unload and lay the pipe, and backfilling over a newly laid pipe with excavated material would be accomplished by reverse operation of the Gradall excavator and boom, excess excavated material being loaded on trucks for removal. Appellant expected to be able to excavate, lay pipe, and backfill at a rapid rate by that method in the sandy soil of Patrick Air Force Base and under the normally dry conditions to be expected during the season in which work was contemplated.

Appellant's principal witness was the president of the plumbing concern which installed the storm sewer system under a subcontract, and he was appellant's only witness concerning the above described methods of operation and their relationship to progress.

The direct testimony of the president of appellant's subcontractor was as follows with respect to expected daily progress:

> "Q. Would you explain to the Board the speed at which the Gradall was operating on this job as compared with the anticipated speed when you prepared the work schedule?

"A. Our work schedule, normally on 48 inch concrete pipe, excavating— as far as excavating, you can excavate easily in a day a hundred feet without any problems. As you drop a piece of pipe in place, this is a mechanical pipe and all it has to be is dropped in place and pulled together.

"There is no other work to perform. Just drop it in. Then the Gradall digs and we dump in a truck some of the excavation and the dump truck carries the extra dirt off the area. With this sort of thing, our crane was standing by a good percentage of the time waiting for enough room to drop pieces of pipe in and the Gradall could not dig at a pace that we nearly possibly could have expected it to move."

48 inch pipe was specified for the first 554 feet of line B, from existing structure A to new structure 5. It can be inferred that, other things being equal, the remaining portions of lines B and C, involving progressively smaller pipe and less excavation could be installed more rapidly than the 48 inch section. It is also evident that the witness was describing forward or moving progress along the path of lines B and C on available work days, which would include as concurrent the stationary progress accomplished on new drainage structures to be constructed at the specified points.

*Reasonable Estimate of Planned Forward Progress Per Available Work Day*

The contentions and testimony just referred to raise the question of the reasonableness of an estimate of progress at a minimum rate of 100 feet per available work day under the method of operation planned.

That estimate implies a minimum expectation of reaching the location of new structure 5 in about 5½ work days, or about 28 January 1963, and of completing both lines B and

C, from the start at existing structure A, in about 31 work days, which would mean completion no later than 5 March 1963. However, the president of appellant's subcontractor, a few minutes after giving the testimony quoted above as to progress at the rate of 100 feet per work day, further testified on direct examination that he had expected to complete the work on 30 April 1963. Since 67 normal work days could have been anticipated through 30 April, completion on 30 April would involve an average rate of progress per available work day on all drameters of pipe of about 46 feet. This would be slightly less than the average of 48 feet implied by appellant's schedule for completion by 19 April. Appellant's own evidence thus indicates that an estimate of a minimum of 100 feet per work day would be excessive.

Circumstances which appellant was bound to take into account in submitting its bid point to a conservative estimate of forward progress per work day. The drawings showed many existing obstacles or possible obstacles to a rapid trenching and pipe laying operation. Four subsurface utilities, not noted to be permanently removed, were shown in the length of 554 feet from existing structure A to the location of new structure 5 on line B. They were not concentrated but scattered and one of them was a converging utility which approximated a position parallel to line B as it approached and crossed line B. Beyond new structure 5 there were six street crossings. The contract as interpreted by the parties contemplated that some delay might arise in connection with street crossings. Also, nine scattered sub-surface utilities, not noted to be permanently removed, were shown, including three parallel structures to be protected or replaced for a total distance, for the three, of about 518 feet. Appellant has acknowledged that the planned method of operation included sending out an advance crew to expose shown utilities. This necessarily contemplated time to execute an indicated solution for the interference shown or for the Government to provide a

solution where none was indicated and for appellant to execute it. In short, both as to the installation of the portion of line B from existing structure A to the location of new structure 5, which is asserted to be the basis of appellant's contention of a forced change in the method of operation, and as to the balance of line B and line C, appellant could not reasonably have expected, on the basis of information on the drawings, to perform a rapid trenching and pipe laying operation without any risk of interruption. A Government engineer testified that the Gradall and crane truck combination was a reasonable method of operation, and that a reasonable rate of forward progress would have been 50 feet per available work day with the 48 inch pipe.

We find that the maximum rate of forward progress in fact contemplated by appellant for the entirety of lines B and C was 48 feet per available work day.

Appellant did not achieve a consistent rate of forward progress equivalent to 48 feet per available work days except for brief periods. Forward progress per available work day had been poor up to the time, 17 April 1963, when appellant says the forced slowdown occurred. Thereafter it improved.

*Actual Progress in the Period 21 January - 17 April 1963— Existing Structure A to Location of New Structure 5 (Rule 4 Supp. Ex. 24; App. Ex. B)*

As indicated in connection with Item 8, above, appellant did not reach the location of new structure 5 until 17 April 1963. Of the 61 normal work days which could have been foreseen in the period from 20 January through 17 April 1963, 28 work days became unavailable, as follows: 8 are accounted for by rain, on 21 January, 4, 12, 19 and 26 February, and 1, 4 and 12 March; 4 constituted the unreasonable delay by the Government found above for Items 1, 2 and 3; 2 constituted unreasonable delay by the Government on Item 8, 5 were in the express suspension period,

being 28 January through 1 February 1963; and 9 constituted Government caused but reasonable delay in connection with Items 1, 2, 5, 6, 7 and 8. That left 33 work days available, during which appellant installed about 564 feet of 48 inch pipe (including about 10 feet added by a rerouting between new structures 2 and 3), at an average rate of about 17 feet per available work day.

Two factors for which the Government was not responsible affected forward progress on some of the 33 available work days.

During installation of line B from existing structure A to the location of new structure 2A, a distance of about 100 feet, appellant was delayed for an undetermined time by its failure to shore the trench, which the contract without dispute required, with the result that several cave-ins occurred. Appellant did not correct the failure to shore until about 18 February 1963. Also, in the period 21 January-17 April, appellant's subcontractor changed his superintendent.

*Genesis of Claimed Slowdown*

Appellant dates from the period 9-17 April its conclusion that slower than normal operation would have to become standard for the remainder of the job on the basis of the encounter in that period with the fourth, fifth and sixth utilities not shown, although the contract contemplated reasonable delay for corrective work in connection with any such utility, and only minor delay beyond a reasonable amount was in fact experienced with those utilities.

Appellant's forward progress per available work day in fact improved after 17 April although it did not reach 48 feet.

*Actual Progress in the Period 17 April - 31 August 1963— New Structure 5 to New Structure 13 on Line B, and New Structure 9 to New Structure 20 on Line C (Rule 4 Supp. Ex. 24; App. Ex. B)*

Of the 96 normal work days foreseeable in the period between 17 April and 31 August 1963, 65 work days became unavailable for forward progress as follows: 6 work days became unavailable because appellant stopped to work on new structure 5 in the period 17-25 April; 9 work days became unavailable solely because of rain, on 3, 8, 9, 10, 11, 22, 23 and 24 July and 16 August; 4 other work days became unavailable because of appellant's "equipment change" and a day of rain, being 30 April, and 1, 2, and 3 May; 34 work days became unavailable in the period 13 May - 28 June on account of "loss of equipment" (On 9 of which days rain also occurred, being days other than the days of rain previously enumerated above); 6 work days constituted unreasonable delay by the Government in connection with Items 15 and 18; and 6 work days constituted Government-caused but reasonable delay in connection with Items 9 through 16. This left approximately 30 work days available. During the 30 available work days appellant installed about 705 feet of 42 inch pipe, 30 feet of 36 inch pipe, 115 feet of 36 x 22 inch pipe, and 315 feet of 30 inch pipe, at an average rate for all sizes of approximately 39 feet per available work day.

In the remaining time to completion on 21 December 1963 appellant's forward progress per available work day was about the same as it had been during the preceding period.

*Actual Progress in the Period 1 September 1963 to the Date of Substantial Completion, 21 December 1963 (Rule 4 Supp. Ex. 24; App. Ex. B)*

There were 78 foreseeable normal work days in the period. 12 of those work days became unavailable on account of rain and 29 work days became unavailable because

of work stoppages due to interferences or changes (the responsibility for which is immaterial for present purposes), leaving 37 work days available. During the 37 work days actually available appellant installed approximately 425 feet of 30 inch pipe, 338 feet of 24 inch pipe, 90 feet of 22 x 13 inch pipe, 447 feet of 18 inch pipe, 10 feet of 15 inch pipe, and 50 feet of 12 inch pipe, at an overall average rate for all sizes of about 37 feet per available work day.

*Conclusions as to Overall Slowdown or Reduction in Efficiency*

The contract terms as interpreted by the parties contemplated some slowing down of pipe laying operations in order to avoid disruption of sub-surface utilities not shown on the drawings. The advertised terms and conditions put appellant on notice that the amount of such slowdown, below a rate of progress which might be anticipated if it were known that no such obstructions were present, was a factor which appellant was bound to take into account in computing its price and its progress schedule. There is no evidence that appellant's failure to achieve its own estimated rate of 48 feet on available work days was due to any act or omission of the Government. Under the terms of the contract; therefore, any slowdown or reduction in efficiency reflected by forward progress at a rate less than 48 feet on available work days was at the risk of appellant.

*Summary*

The appeal is dismissed as to the subject matter of Modification 32 to the extent found above. As to the 12 days' delay found to have been unreasonable, the appeal is sustained and the matter of the amount of equitable adjustment in the contract price therefor is remanded to the parties for negotiation within the limits hereinbefore stated. If the parties fail to agree the contracting officer will make a unilateral determination of the amount, from

which appellant may again appeal if dissatisfied. In all other respects the appeal is denied.

Dated 30 June 1966.

BEVERLY TUCKER THOMPSON
Beverly Tucker Thompson
Member of Division No. 9,
Armed Services Board of
Contract Appeals

I Concur

CARL A. TURMO
Carl A. Turmo, Vice Chairman,
Armed Services Board of
Contract Appeals and
Member of Division No. 9

I Concur

HUGH B. ARCHER
Hugh B. Archer
Member of Division No. 9,
Armed Services Board of
Contract Appeals

I certify that the foregoing is a true copy of the opinion and decision of the Armed Services Board of Contract Appeals in ASBCA No. 10247, appeal of Fryd Construction Corporation, rendered in conformance with the Board's Charter.

Dated: 8 July 1966

GEORGE L. HAWKES
George L. Hawkes, Recorder
Armed Services Board of
Contract Appeals

JUL 20 1970

E. ROBERT SEAVER, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. [redacted] 193

FRYD CONSTRUCTION CORPORATION and TRAVELERS INDEMNITY COMPANY,
*Petitioners,*

vs.

UNITED STATES OF AMERICA, for the Use and Benefit of T/N PLUMBING & HEATING CO.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

## No. 1622

FRYD CONSTRUCTION CORPORATION and TRAVELERS INDEMNITY COMPANY,
*Petitioners,*

vs.

UNITED STATES OF AMERICA, for the Use and Benefit of T/N PLUMBING & HEATING CO.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The summary judgment (Pet. App. 12a-15a) entered by the district court (R 1022-1025) is not officially reported. The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 423 F.2d 980.

## JURISDICTION

The judgment of the court of appeals was entered on February 19, 1970 (Pet. App. 10a-11a). Petition for rehearing was denied on April 13, 1970 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on May 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether, in a Miller Act suit commenced by a subcontractor to recover damages against the prime contractor and its surety, the subcontractor is entitled to an evidentiary trial on the merits to resolve disputed issues of fact.

## STATEMENT

Respondent instituted suit against petitioners under the Miller Act (40 U.S.C., §§ 270a-270d) for monies it claimed to be due it arising out of its subcontract on a government construction job. The district court granted petitioners' motion for summary judgment while recognizing that they held a sum of money belonging to respondent (Pet. App. 14a-15a) under the subcontract. On the whole record, the court below reversed petitioners' summary judgment and remanded the case "* * * for a full evidentiary trial on the merits" because the disputes between the parties "cannot properly be resolved, therefore, by motion for summary judgment." Federal Rules of Civil Procedure, Rule 56.

## ARGUMENT

1. There is no conflict with the decisions of this Court. On the contrary, the opinion below clearly agrees with prior opinions of this Court. See, e.g., *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620; *Poller* v. *Columbia Broad-*

*casting System, Inc., et al.*, 368 U.S. 464; and Mr. Justice Black's dissent in *Beaufort Concrete Company* v. *Atlantic States Construction Company*, 384 U.S. 1004.

2. There is no conflict among the circuits. The issue decided in the court below turned on the application of Rule 56, Federal Rules of Civil Procedure, dealing with motions for summary judgment. On the record, the court below found that there were genuine issues of material fact which must be tried. While the issue presented by petitioner may be of limited importance to the construction industry, the present record on summary disposition contains neither findings based on litigation nor a comprehensive statement of agreed facts. The consideration given *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, is appropriate. The Court there stated:

> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts."

3. The decision of the court of appeals, that the entry of summary judgment was improper, is clearly correct and presents no issue warranting plenary consideration by this Court. Even though the district court recognized that at the time respondent instituted its Miller Act suit Fryd had withheld monies due the subcontractor, it resolved the factual issues involved and entered the summary judgment. This is clearly an improper application of the summary judgment rule.

Stripped to its essentials, the petitioner asks this Court to determine whether the court of appeals was right or wrong in reversing the summary judgment. The court below clearly determined from its review of the record that there was a head-on factual controversy as revealed by

the material before the district court. The affidavits and other exhibits contain sufficient underlying facts which, when viewed in the light most favorable to the respondent, raised genuine issues as to material facts. Consequently, summary judgment was improper. *United States v. Diebold, Incorporated*, 369 U.S. 654.

The record, which included affidavits, depositions, answers to interrogatories, pre-trial stipulation and other pleadings, plainly establishes that respondent was entitled to a full evidentiary trial of its claim for labor and materials furnished pursuant to its subcontract and required for the performance of the prime contract.

The affidavit of Jerome Nagelbush (R 294) states that the actual, reasonable and necessary costs incurred by respondent over a period of one year were $147,840.99 in the performance of the drainage structures portion of the subcontract; that the costs were occasioned by thirty-two obstructions not shown or incorrectly shown on the plans; that the job required 365 days instead of 88 days as scheduled by respondent, which schedule was confirmed by petitioners and the government; and that petitioners agreed to pay the necessary, reasonable and actual costs and ordered respondent to do the work which resulted in such costs. The obstructions encountered were described fully in the exhibit attached to the affidavit. The affidavit of Jacob Rothfarb (R 311), certified public accountant, confirmed the expenditure of costs of $147,840.99. The affidavit of Jerome E. Saladino (R 306) confirmed that he was a graduate engineer; that he bid the job for respondent at $66,140; that the bid was accurate and the on-site investigation gave no indication of the obstructions that were not shown or incorrectly shown by the plans; that the job had to be performed as if "skating on thin ice" and that the estimate or bid was worthless because

of the unshown and incorrectly shown obstructions. The affidavit of Roland E. Wile (R 309), respondent's general superintendent, confirmed that the obstructions made the job a series of unpredicted stops and interferences.

In *Illinois Surety Co.* v. *John Davis Co.*, 244 U.S. 380, Mr. Justice Brandeis said:

> "In every case which has come before the Court where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the act. *Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this Statute.*" (Emphasis supplied)

There is no question but that respondent is entitled to damages under the Miller Act for extra work done resulting from engineering errors and obstruction and delay. *Kincaid & King Construction Company* v. *U. S.*, 333 F.2d 561 (CA 9 1964).

The respondent incurred costs of $155,340.99, which includes $147,840.99 in costs attested by the affidavit of Jacob Rothfarb, CPA, plus $7,500.00 for expenses incurred with respect to respondent's superintendent, Roland E. Wile, and tools and equipment consumed on the job. Respondent's overhead was $15,534.10 or a total of $170,875.09. It was entitled to a profit of $17,087.51, or a total of $187,962.60. Respondent incurred backcharges of $4,743.20 and $84.30, or a total of $192,790.10.

The Miller Act is highly remedial in nature and should be construed liberally. *Fleisher Engineering Co.* v. *United States for Use and Benefit of Hollenbeck*, 311 U.S. 15. It represents a congressional effort to protect persons supplying labor and material for federal buildings. *United*

*States for Use and Benefit of Sherman* v. *Carter*, 353 U.S. 210.

The district court in granting the summary judgment determined that respondent could not avail itself of federal rights provided under the Miller Act and dismissed the cause (Pet.App. 15a) although it ordered petitioners to pay out money to others that they owed respondent. The court of appeals correctly disagreed.

It is now up to the district court, on full evidentiary trial, to apply the proper rules of law to the facts.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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1205 Universal Marion Building
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July 1970